

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| MOHAMMED ZAHANGIR ALAM | : | ORDER |
| | : | DTA NO. 819188 |
| for Revision of a Determination or for Refund of | : | |
| Sales and Use Taxes under Articles 28 and 29 of the Tax | : | |
| Law for the Period March 1, 1998 through February 28, | : | |
| 2001. | : | |

Petitioner, Mohammed Zahangir Alam, 201 Ocean Parkway, Apt. # 4H, Brooklyn, New York 11218, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1998 through February 28, 2001.

A small claims hearing was scheduled before Presiding Officer Thomas Sacca at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on Tuesday, March 30, 2004 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request, received April 28, 2004, that the default determination be vacated. The Division of Taxation did not oppose petitioner's application to vacate the default.

Petitioner, Mohammed Zahangir Alam, appeared on his own behalf.

Upon a review of the entire case file in this matter as well as the arguments presented for the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On October 28, 2002, the Division of Tax Appeals received a petition from Mr. Mohammed Zahangir Alam protesting an assessment of sales and use taxes issued under Articles 28 and 29 of the Tax Law. The assessment, Notice of Determination Number L-020741077, dated April 29, 2002, imposed additional tax of \$16,658.99 plus penalty and interest with respect to petitioner's rental of a hot dog vending pushcart and sales of food from such pushcart.

2. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services and a conference was held on August 15, 2002. The conferee proposed that the tax be reduced to \$4,300.64 with interest of \$644.66 and cancellation of penalty. However, petitioner did not accept this settlement. Accordingly, the conferee issued an order sustaining the original notice for \$16,658.99 plus penalty and interest.

3. On February 25, 2004, the assistant calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Office of Counsel of the Division of Taxation advising them that a hearing had been scheduled on Tuesday, March 30, 2004 at 9:15 A.M. at the offices of the Division of Tax Appeals at 641 Lexington Avenue, New York, New York. On March 30, 2004 at 9:15 A.M., Presiding Officer Thomas Sacca called the ***Matter of Mohammed Z. Alam***, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on his behalf. The representative for the Division of Taxation moved that petitioner be held in default. On April 19, 2004, Presiding Officer Sacca issued a determination finding petitioner in default.

4. On April 28, 2004, the Division of Tax Appeals received petitioner's request to vacate the default. In his request, petitioner stated that he had never received the Notice of Small Claims Hearing and had missed his hearing for that reason. He explained that he had been on

vacation from December 28, 2003 to March 27, 2004. To demonstrate this, petitioner has submitted a copy of the passenger receipt for his flights. The receipt indicates that Mr. Mohammed Z. Alam flew on Kuwait Airways, departing from JFK Airport on December 28, 2003 and arriving in Dhaka, Bangladesh on December 30, 2003. The return flight was on March 26, 2004 arriving at JFK airport on March 27, 2004.

5. On April 29, 2004, a copy of petitioner's application to vacate was sent to the Division of Taxation. The Division was given 30 days to respond to the application to vacate the default. The Division of Taxation did not oppose the application.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that

he had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner's explanation has established reasonable cause for his failure to appear at his hearing. The mere denial of receipt of a properly mailed hearing notice is not reasonable cause for failure to appear at a hearing. If it were, everyone could merely deny receipt of the hearing notice in order to vacate a default. However, in the instant matter, petitioner has established that he was out of the country from a time well before the hearing notice was mailed until just before the hearing was held. It is understandable that petitioner may not have been able to open all of his mail immediately after being out of the country for three months. Accordingly, I find that petitioner has established reasonable cause for his failure to appear at his hearing.

D. The conciliation conferee was willing to reduce the tax in this matter from \$16,558.99 to \$4,300.64. While this proposed settlement is in no way binding or precedential, it does indicate to me that some adjustment to the assessment may be called for. A proposed reduction of this magnitude is sufficient to establish that there is enough merit to petitioner's claims to warrant a hearing. Accordingly, I find that petitioner has a meritorious case and that the default determination should be vacated.

E. It is ordered that the request to vacate the default order be, and it is hereby, granted and the Default Determination issued April 19, 2004 is vacated and a new hearing will be scheduled as soon as is practical.

DATED: Troy, New York
July 22, 2004

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE